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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 25, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JAN 25 PM 3:29
CHIEF CLERKS OFFICE

Re: Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345
SOAH Docket No. 582-05-0593
TCEQ Docket No. 2004-049-AIR

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter is the Office of Public Interest Counsel's Brief. Please accept the original and eleven of the twelve copies for filing, and return the last copy for our records.

Sincerely,

A handwritten signature in cursive script, reading "Emily A. Collins".

Emily A. Collins, Attorney
Office of Public Interest Counsel

Cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2004-0049-AIR

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APPLICATION OF ASARCO,
INCORPORATED TO RENEW
AIR QUALITY PERMIT NO.
20345§
§
§
§BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

THE OFFICE OF PUBLIC INTEREST COUNSEL'S BRIEF

The Office of Public Interest Counsel of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Brief on the legal issues involved in ASARCO, Incorporated's (ASARCO's) changes to its ConTop facility as allowed by letter of the General Counsel of the TCEQ. For the reasons expressed in OPIC's prior filings and arguments, OPIC continues to disagree with the strained statutory interpretation of Texas Health and Safety Code section 382.055 leading to the Commission's second deliberation on ASARCO's proposed permit renewal. In addition, based on the Executive Director's July 27, 2007, Response to Comments, OPIC remains concerned about ASARCO's replacement and re-building of its ConTop facility.

I. The ED's Report and Response to Comments Fail to Adequately Analyze the Appropriateness of an Amendment Application Based on ASARCO's Statements at the Hearing on the Merits that it Rebuilt and Replaced the ConTop Reactors.

During the public interest hearing regarding ASARCO's renewal application, an ASARCO witness testified that the ConTop reactors permitted in 1992 were replaced with reactors designed and built by ASARCO itself after the reactors began leaking water.¹ The originally installed reactors were licensed and built by an entity unaffiliated with ASARCO, but ASARCO itself redesigned and rebuilt its cooling system for the ConTop reactor resulting in

¹ Tr. at 206, 368-370.

changes to the mechanical structure of the reactors.² In closing arguments, OPIC, the City of El Paso, and all of the Protestants raised the issue of ASARCO's re-build and replacement of its reactors as a significant change that was never before brought to TCEQ's attention prior to the 2005 hearing. In response, the Commissioners ordered the ED to "assess the appropriateness of a permit amendment application rather than a renewal application for equipment that has not been previously authorized or that requires repair or replacement."³

Although the permit engineer was not aware of the ConTop replacement,⁴ the ED states in his RTC that ASARCO reported the replacement of the "original reactor vessels" to TCEQ's Regional Office during an annual investigation in 1994.⁵ The ED claims in the RTC that the "change" fell under Standard Exemption No. 111 "for replacing like or same equipment."⁶ As demonstrated below, however, ASARCO did not meet (and continues not to meet) the conditions for that exemption as stated in the standard exemption list in 1994.

The Commission may exempt "changes within any facility" from the requirements of THSC section 382.0518 if "it is found on investigation that such changes will not make a significant contribution of air contaminants to the atmosphere."⁷ The Commission's Standard

² Tr. at 206, 368-369. Larry Castor, for ASARCO, testified that "[t]he physical dimensions and the entry points and how the reactor worked all remained exactly the same, but the mechanical structure of the how the reactor was put together was what we changed." Tr. at 206.

³ Interim Order, page 11.

⁴ Mr. LeRoy "Skip" Clark testified that he was not aware that ASARCO had replaced the ConTop reactors and if a facility replaces a permitted facility or emission source, TCEQ typically requires notice and approval prior to replacement. Tr. at 1726, lines 7-14.

⁵ OPIC believes this annual inspection to have been conducted between May 31, 1994, through June 3, 1994, as stated in the PFD on pages 117 through 118.

⁶ ED's RTC, Response 18, page 19.

⁷ THSC § 382.057 (1994).

Exemption List generally allowed exemptions from permit requirements if several conditions were met.⁸

The Commission has now incorporated its standard exemption list⁹ into the Chapter 106 Permits by Rule as of 1997,¹⁰ but Standard Exemption No. 111¹¹ in each of the three versions from 1989, 1992, and 1994 allowed an exemption only upon demonstration that the following seven conditions have been met:

- (a) The replacement facility functions in the same or similar manner as the facility to be replaced.
- (b) The emissions from the replacement facility are not more than nor have different characteristics than those from the facility to be replaced.
- (c) The emissions from the replacement facility will not exceed 25 tpy of any air contaminant.
- (d) The physical location of the replacement facility is the same or immediately adjacent to the facility being replaced.
- (e) There will be no increase in capacity, production rate, or throughput as a result of the replacement.
- (f) Notwithstanding the provisions of (c) above, the emissions from the replacement facility will not contain any compounds (other than CO, NO_x, or SO₂) listed or proposed to be listed as hazardous constituents in 40 CFR 261, Appendix VIII.
- (g) Notification of the replacement is provided to the Executive Director within 10 days following installation of the replacement facility.

Unfortunately, based on the record from the hearing on the merits and the ED's Report, no evidence exists to make a determination that these conditions were met when ASARCO replaced and rebuilt its ConTop facility. The same annual inspection in 1994 when ASARCO apparently reported replacement of the original reactors also resulted in a Notice of Violation for

⁸ 30 TAC § 116.211 (1994). These conditions can now be found at 30 TAC section 106.4(a) (2007).

⁹ 30 TAC § 106.13 (2007).

¹⁰ 22 Tex.Reg. 2445 (March 4, 1997).

¹¹ Standard Exemption No. 111 is now 30 TAC section 106.264 (2007).

a plethora of emission and monitoring violations, including excessive SO₂ emissions.¹² Yet, the August 2, 1994, NOV does not evaluate the emissions differences between the original ConTop facility and the rebuilt facility, and it does not consider the similarity in function of the comparative facilities.¹³ Indeed, based on the ED's mandate that ASARCO retain a third party process engineer to assess the functioning of ASARCO's equipment, OPIC is uncertain that such an assessment could have been performed during an inspection.

Furthermore, it appears that ASARCO did not meet the standard exemption requirement that "[t]he emissions from the replacement facility will not exceed 25 tpy of any air contaminant."¹⁴ The 1992 permit includes an emission point that specifically refers to the "stack serving reactor furnace operation," and limits SO₂ emissions to 127.10 tons per year.¹⁵ Another emission point refers to the "stack annulus serving fluid bed dryer & converter building ventilation baghouses, bin B2A, bin B2B, & reactor feed distribution system." The maximum allowable emission rate from that stack under the 1992 permit is 951.60 tpy for SO₂. As both of these emission points appear to be associated with the ConTop reactors and have emission limits higher than 25 tpy for SO₂, OPIC cannot agree that the ED properly found in 1994 that ASARCO's report of its rebuild and replacement of its ConTop facility entitled ASARCO to a standard exemption.

¹² PFD at page 117-118.

¹³ TNRCC Standard Exemption List, effective May 4, 1994, Exemption No. 111(a), (b); *see also* 30 TAC § 106.264(1), (2) (2007).

¹⁴ TNRCC Standard Exemption List, effective May 4, 1994, Exemption No. 111(c); *see also* 30 TAC § 106.264(3) (2007). OPIC notes that, while other conditions to acquire a standard exemption for a replacement facility involve an explicit comparative analysis of the replacement facility to the facility to be replaced, subsection (c) does not contain such a comparative analysis. Therefore, OPIC interprets subsection (c) to refer to, simply, whether the replacement facility will emit 25 tpy or more of any air contaminant.

¹⁵ ASARCO Ex. 25, page 20.

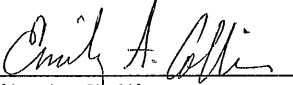
Finally, as the changes to the ConTop facility were not reported at all until discovered by TCEQ during an annual inspection, there is no indication that ASARCO met the standard exemption condition that it must notify the ED within 10 days following installation of the replacement facility of the replacement.¹⁶ In fact, Mr. Castor, for ASARCO, testified that ASARCO replaced the reactors in 1993, which is a far cry from 10 days prior to the May 31, 2004 annual inspection.¹⁷

II. Conclusion

OPIC continues to stand by our procedural comments and recommends that the Commission deny ASARCO's renewal request. OPIC also finds the ED's Report and Response to Comments regarding the replacement and rebuilding of the ConTop reactors insufficient. Therefore, OPIC requests that the Commission revise the ED's Recommended Report to include provisions for review of the ConTop re-design and replacement to determine if an amendment is necessary.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

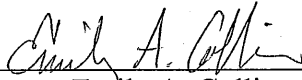
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¹⁶ TNRCC Standard Exemption List, effective May 4, 1994, Exemption No. 111(g); *see also* 30 TAC § 106.264(7) (2007).

¹⁷ Tr. at 369, lines 1-12.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2008, the original and eleven true and correct copies of the Office of the Public Interest Counsel's Brief were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


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